IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ASHLEY N WELTER Claimant **WATERLOO SCHOOL DISTRICT** Employer	**APPEAL 17A-UI-06608-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/25/16** **Claimant: Appellant (2R)**

Iowa Code § 96.6(2) – Timeliness of Appeal

Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 13, 2017, (reference 04) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 25, 2017. The claimant participated personally. The employer participated through Beth Hansen, attorney at law. Erica Hopper, (benefits and training coordinator), Melissa Steggall (principal) and Mickey Waschkat (human resources specialist) testified on behalf of the employer.

Department Exhibit D-1 and Employer Exhibits A through E were received into evidence. The claimant previously went by the name Ashley Pavelec while employed, and some evidence refers to her by that name. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Did the claimant voluntarily quit the employment with good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision resulting in disqualification of benefits was mailed to the claimant's last known address of record on June 13, 2017 (Employer Exhibit A). The decision contained a warning that any appeal must be filed by June 23, 2017. The claimant checked her mail daily, and the mail is collected by her parents. If she had mail, her father set it out for her. The claimant did not receive the June 13, 2017 decision for unknown reasons. The claimant did receive the decision of overpayment, dated June 26, 2017 (Reference 05) and appealed both decisions on June 29, 2017, (Department Exhibit D-1) within 10 days of mailing of the June 26, 2017 decision.

The claimant was employed full-time as a behavior intervention specialist at an elementary school and was separated from employment on May 16, 2017, when she quit the employment without notice (Employer Exhibit C.) Continuing work was available.

As a behavior intervention specialist, the claimant was assigned to a classroom with a teacher and one other behavior intervention specialist. The claimant was aware that she would be responsible for supervising, redirecting and behavior modification for students who had known tendencies of behavioral issues, such as acting inappropriately or requiring direct supervision (Employer Exhibit D). At the time of hire, the claimant was aware the children she worked with may be challenging at times, but was unaware that she was pregnant. In April, she notified her principal, Melissa Stegall, that she was pregnant. No requests were made by the claimant or recommended by her doctor at that time, nor did the employer discuss any modifications that should be made in light of the population the claimant worked with, given her pregnancy.

The claimant stated she was routinely scratched or bruised as a result of intervening in conflict, and expected it as part of the job duties. She continued to work without major issue with the employer until May 2, 2017. At the time, the claimant was approximately 18 weeks pregnant and her students had been informed of the pregnancy. On that day, a fourth-grade male student was trying to run out of the classroom, and the claimant stepped in the doorway to stop him from leaving. During the exchange, the student threw a half empty water bottle, striking the claimant's neck or face, shoved her with his hands, before hitting her chest with an open hand. He also told the claimant he wanted her to die and he wanted to murder the baby. The claimant experienced minimal pain but no apparent complications to her child. The claimant's co-worker, Bri Meyers, stated she would report the incident. The claimant did not report it on her own behalf until May 10, 2017 (Employer Exhibit B) when she learned she was expected to complete her own incident report. In response to the notification of incident, the employer sent the claimant to the Allen Hospital on May 11, 2017. The claimant was released without restrictions or issue (Employer Exhibit E).

On the same day, the claimant experienced a second incident with two male students, in grades 3 and 5, who were fighting in a doorway. When the claimant attempted to step between the two, she was shoved, with her side hitting the doorway frame, and punched in the stomach. The claimant met with her ob-gyn on May 15, 2017 who asserted the claimant should give careful consideration to continuing employment, as the baby would be safe unless her body/stomach was struck. The doctor did not provide any document in writing advising the claimant to quit, but upon consideration, the claimant tendered her resignation to Ms. Stegall on May 16, 2017 (Employer Exhibit C).

The claimant is currently pregnant with an expected due date of October 4, 2017. She also stated she became reemployed through self-employment by way of home day care service.

REASONINGS AND CONCLUSIONS OF LAW:
The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information

> concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the overpayment decision, which was the first notice of disqualification. The claimant filed an appeal within a reasonable period of time after discovering the disqualification. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her employment with good cause attributable to the employer.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.26(2) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (2) The claimant left due to unsafe working conditions.

In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25. "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Industrial Relations Commission*, 277 So.2d 827 (Fla. App. 1973). Good cause need not be based upon full or wrongdoing on the part of the employer, but may be attributable to the employment itself. *Raffety v. Iowa Employment Security Commission,* 76 N.W.2d 787 (Iowa 1956). Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

Generally notice of an intent to quit is required by Cobb v. Employment Appeal Board, 506 N.W.2d 445, 447-78 (Iowa 1993), Suluki v. Employment Appeal Board, 503 N.W.2d 402, 405 (Iowa 1993), and Swanson v. Employment Appeal Board, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court has concluded that, because the intent-to-quit requirement was added to 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. Hy-Vee, Inc. v. Employment Appeal Bd., 710 N.W.2d 1 (Iowa 2005).

In this case, the claimant and her unborn child were being threatened of physical harm. The claimant made the employer of aware of her pregnancy in April 2017. It is understandable that the employer would have limited options in removing the claimant from all potentially harmful or physical exposure, given the nature of students assigned to the claimant but it does not negate the fact the claimant experienced real and actual threats to herself and her child. The claimant provided credible testimony that on two occasions she was physically struck in the stomach, over a ten day period, and in fact, on May 2, 2017 the claimant was singled out by a child, who specifically told the claimant he wanted to murder her baby and make the baby die, coupled with physical contact by way of striking her stomach. The administrative law judge is persuaded that the claimant voluntarily resigned due to unsafe work conditions, which were attributable to her employer, and therefore, is eligible for benefits.

DECISION:

The June 13, 2017 (reference 04) decision is reversed. The appeal is timely. The claimant voluntarily left the employment with good cause attributable to the employer. Benefits are allowed, provided the claimant is otherwise eligible.

REMAND: The issue of whether the claimant is able to and available for work effective May 21, 2017 (based on the claimant's self-employment and pregnancy through October 4, 2017) is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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